In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4351

ED J. HAGEN — Plaintiff in Error

vs.

UNITED STATES OF AMERICA — Defendant in Error.

Honorable Jeremiah Neterer, Judge

Brief of Defendant in Error

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STATEMENT OF THE CASE.

On February 20, 1923, Federal Prohibition agents, under authority of a search warrant, searched the premises of Mr. and Mrs. Brown and Annie Givens at 122 Broadway, Seattle, Washington. Certain liquors and other evidence was seized that night, most of which was taken from the room of ANNIE GIVENS. She had the custody of the books showing the dealings in intoxicating liquors. She was not indicted, but called by the government

as a government witness for the purpose of identifying the documents, and of course was a hostile witness. She testified that she kept the books, that she lived there with her father and mother, but that the defendant Hagen did not live there, and the record shows conclusively that he did not live there. The petition to suppress shows that it was made in behalf of the defendant Pielow, and not in the behalf of the defendant Hagen, and does not allege that he lived there. (Tr. 15.)

ARGUMENT.

I.

The only persons who may complain of a search and seizure are the owners in possession of premises; consequently no one but Mr. Brown, who is an acquitted defendant in this case and the owner of the premises at No. 122 Broadway, is in a position to complain, the record showing that Hagen did not live there. (Tr. 51.)

Hale v. Hankel, 201 U. S. 43;
Bordeau v. McDowal, 256 U. S. 465;
Remus v. U. S., 268 Fed. 501;
Haywood v. U. S. 287 Fed. 69;
Schwartz v. U. S. 294 Fed. 528;
McDaniel v. U. S. 294 Fed. 769.

II.

THE SUBMISSION TO THE JURY OF THE ENVELOPES WITH THE IDENTIFICATION MARKS UPON THEM WAS NOT ERROR.

The various sales slips taken from the room of Annie Givens, and various documents taken from the persons of the defendants, were enclosed in envelopes for the purpose of segregation and identification in court by the Assistant United States Attorney, and the contents of the envelopes were marked on the outside of the envelope, and were handled and used during the trial in this condition. THE CLERK'S IDENTIFICATION MARKS WERE PLACED UPON THE ENVELOPES, and they were identified during all stages of the trial by numbers, as the court may ascertain facts from an inspection of the impounded documents. Proof was offered during the trial as to everything that was written on the back of these envelopes. C. O. Myers has testified that for a number of years C. H. Brown had his telephone on a four-party line, and that this telephone had been changed on January 4, 1923, to a one-party line, and also the number had been changed (keeping in mind the fact that this conspiracy dated from December 15, 1922).

During the trial these exhibits were kept in the several envelopes, and were used on occasions while so enclosed, and in this manner were offered in evidence, tendered to counsel, and were accepted in evidence without abjection. (Tr. 78.)

In the motion for reconsideration of motion for the new trial (Tr. 32) counsel alleges *unavoidable casualty* (Tr. 30), but in his affidavit (Tr. 35) he says that he did not see "*nor sought to see them,*" though they were tendered to him at all times during the trial, objection being made to all of them at the time they were offered in evidence, upon the ground that the various documents were seized in violation of the defendants's constitutional rights, that being the sole and only objection made.

In the case of U. S. v. Edward J. Hagen, Edward W. Pielow, Charles Givens and Christopher Brown, the Court said:

"The defendants were tried and except as to Brown, were convicted. Motions for new trial and in arrest of judgment were filed and denied. The defendants Hagen and Pielow were sentenced to the Federal prison and Givens to the county jail. Petition for writ of error was filed and allowed, citation issued, defendants Pielow and Givens admitted to bail on the 24th day of March, and Hagen

on March 25th, 1924. On March 29th, the defendants severally moved the court for a 'reconsideration of their motion for a new trial herein and for an order vacating the verdict and granting them a new trial on the grounds specified in said motion and on the additional ground of unavoidable casualty and misconduct preventing them from having a fair trial, and more particularly, because as more fully specified in the affidavit of S. G. F. Vanderveer, there was submitted to the jury that tried said case and there were considered by said jury in arriving at their verdict a large number of envelopes containing inscriptions highly prejudicial to the defendants which were not admitted in evidence nor supported by any testimony in the case.' The affidavit sets out:

* * * That on the trial of said cause a great many cards, sales slips, memoranda and other documents were identified by various witnesses as papers taken from the possession of either the defendant, Ed. J. Hagen, or Ed. W. Pielow from the room of Annie Givens; that among other exhibits so identifiied were the following, to-wit: * * *

Then are enumerated Government's Exhibits 6, 7, 8, 10, 13 and 14, each consisting of a bundle of slips taken from the room of Annie Givens—Government's Exhibits 11, 12 and 15, each consisting of papers taken from the person of the defendant Hagen, Exhibit 15, consisting of a memorandum book and other papers taken from said defendant Hagen; Exhibit 18, consisting of papers taken from the possession of defendant Hagen; Exhibit 20, 'consisting of other papers which on

account of the present scrambled condition of the exhibits deponent is not able to specifically identify;' Exhibit 21, 'consisting of cards taken from the possession of defendant Hagen;' that * * * said papers and documents, as they were identified by the several witnesses and none of them were enclosed in any envelopes or other containers, nor were any envelopes or containers identified by the witnesses as a part of the exhibits.

"The affiant estimates that more than two hundred separate articles, papers, and documents were thus identified and admitted in evidence, the same having been kept from the date of seizure *'in the secret custody of government officials,' and 'deponent neither had nor sought an opportunity to examine them or study their contents; that because of their great volume deponent made no attempt to study said exhibits during the progress of the trial,* nor did he examine or comment on any of them in the course of his argument to the jury, and for all of said reasons deponent had no occasion to, nor did he ever inspect said exhibits after their identification by the various witnesses until the 27th day of March, 1924; that in the course of preparing the defandtns' proposed bill of exceptions he secured the same from * * * the Clerk for the purpose of preparing a descriptive list to supplement the transcript of testimony * * * and * * * discovered * * * that all of said exhibits * * * * except insofar as they had become disarranged, were contained in envelopes bearing certain inscriptions upon them, * * * 'Slips showing purchases,' 'Expenses,' 'Withdrawals by

Hagfien,' 'Slips showing withdrawals by Charley,' '20th slip on day of arrest—Sales slip,' 'Rainier Club Sales slip,' 'Slips showing expenses—see slip as to charity,' 'Slips showing def. handwriting and Anna's handwriting,' 'payments on the 31st,' 'Withdrawals Feb. 10th,'' Slip showing withdrawal of money by Hagen' and other similar inscriptions upon various other exhibits. It is stated that the envelopes were submitted to the jury.

"*The fact is that these several slips and memoranda had been enclosed in envelopes; these envelopes, with the slips enclosed, were presented to the witnesses for identification and the envelopes containing the slips were marked by the clerk and these envelopes, with the slips enclosed, were sent to the jury room.* (Italics mine.)

"Upon arraignment, the defendants moved to quash the indictment upon the ground that there had been submitted to the grand jury: 'A large number of letters, books, papers, memoranda, cards, accounts, and a number of bottles of intoxicating liquor unlawfully seized in the possession of the defendants * * * at their dwelling * * * upon a void search warrant * * * in violation of the defendants' rights and the 4th and 5th amendments to the Constitution of the United States.'

"There was also filed a motion and affidavit for a return of the books and memoranda and the suppression of the liquor as evidence in the case because of the unlawful seizure thereof in violation of the 4th and 5th amendments to the consti-

tution and of Title II of the Act of Congress of June 15, 1917. The motions to quash and for return and suppression of the evidence were denied. When these various evidentiary matters were offered in evidence upon the trial the defendants objected on the ground that

" 'The articles were seized from defendants unlawfully and without any warrant in law, and are the same articles which have heretofore petitioned for the return and suppression.'

"*It is needless to say that if the court's attention had been challenged by objection to the inclusion of the various slips in the several envelopes in which they were contained, when presented to the witnesses for identification and marked by the clerk, the envelopes would have been excluded from the jury.* During the course of the trial these exhibits were kept in the several envelopes. They were used upon the trial as occasion required while so enclosed, and in this manner were submitted to the jury for examination in the jury room." (Italics mine.)

Therefore, it would appear that counsel is relying upon his dereliction of duty in view of the character and seriousness of this case, endeavoring to make a mountain out of a mole mill. In view of the number of exhibits that were offered it would appear that it would have been *impossible* for counsel to have overlooked the documents, and is relying upon wilful conduct for reversal.

The decisions cited by counsel in his brief on page 21 are not in point:

"In Hutchinson v. Decatus, 12 Fed. Caces 1087, No. 6956, the jury without the defendant's consent and the same not having been introduced in evidence, had a paper containing a statement of the plaintiff's account in suit.

"In U. S. v. Clark, 25 Fed. Cases, page 454, No. 14810, the jury had the coroner's inquest, not in evidence, and depositions.

"In Meyer, et al. v. Cadwallader, 49 Fed. 32, an action extending several days, newspaper comments of gross nature, well calculated to prejudice a jury against one of the parties, were published during the trial, and after several attacks a motion was made by the attacked party to withdraw one of the jurors and to direct a re-trial.

"Ogden v. U. S., 112 Fed. 523 at 526. The jury was handed by an officer of the court the indictments, which were taken to the jury room with the other papers for their consideration, and on the back of the indictments was an endorsement of the findings of the jury in the former trial, finding the defendant guilty.

"Alaska Commercial Co. v. Dinkelspiel, 121 Fed. 318. A writing was offered, objected to, not admitted, marked for identification, and counsel was permitted to 'base an argument thereon' and the paper writing was sent out to the jury.

Waite v. State, 162 Pac. 1139-42. A written objection of the guardian *ad litem* to the report in

issue, filed by the defendant and not introduced in evidence, was sent to the jury room. The court said 'It may not be improper to add here that a prosecuting officer should see that when papers are being delivered to the jury no improper documents are included therein.'

"Thomas v. State, 164 Pac. 995-98. The court said: 'It appears that the entire transcript of the testimony given at the preliminary examination was upon request allowed to be taken to the jury room for the purpose of permitting the jury to read certain portions of such evidence introduced upon the trial, both as original and impeaching evidence. While it is not clear that the jury considered or read any of this evidence such as was introduced upon the trial of this case, it is clearly evident that the opportuity to receive and examine other evidence than that received in court was afforded." * * *

In the case of the United States of America v. Edward J. Hagen, Edward W. Pielow and Charles Givens, filed April 24, 1924, Judge Neterer said:

"From a misapprehension of the defendant Hagen's relation to the writ of error proceedings, to which he was not a party, it was concluded that the court had lost jurisdiction of all of the defendants. The memorandum of defendants filed April 22nd will be considered as a motion for rehearing.

"A re-examination of the record is conclusive that Pielow and Givens cannot complain, were not prejudiced, and had no right jeopardized or privi-

lege encroached upon by the memoranda upon the envelopes containing the various exhibits introduced and admitted in evidence, and the same may be said of the defendant Hagen, considering the connection in which used, or memoranda made, and in view of the testimony submitted, no right has been withheld or encroached upon, and no case has been presented, nor have I found any which goes to the extnt of saying that under the evidence before the court, the court would be warranted in granting an ew trial asc to the defendant Hagen, or to make application to the Circuit Court of Appeals for a return of the record and release of appellate jurisdiction to to Pielow and Givens to the end that this court may proceed fur in the case, as has been suggested may be proper in some decisions. See:

Strand v. Griffin, 135 Fed. 739;

Cimiotti Co. v. Am. Mach. Co. 99 Fed. 1003;

Wagner v. Meccano, 235 Fed. 890;
Green v. United States;

Mossberg v. Nutter, 124 Fed. 966;

U. S. v. Mayer, 235 U. S. 55.

"*There is nohting before the court to intimate that the jury considered the memoranda endorsed upon the envelopes, or that they were influenced thereby, and there is nothing in any of the memoranda from which the court can conclude that the jury might have been influenced, in view of the testimony and record.* The only issue, in my judgment, in this case is—were the documents and

memoranda, etc., admitted in evidence illegally seized? That is for the appellate court to determine, this court having concluded against the defendants. The court must decline to request the Circuit Court of Appeals to relinquish jurisdiction as to Pielow and Givens and the motion of the defendant Hagen is denied."

Wells v. U. S. 273 Fed. 625;

Yaffe v. U. S. 276 Fed. 497,Certiorari to Supreme Court denied;

Smith v. U. S. 267 Fed. 665, Certiorari denied in 256 U. S. 691;

Rosen v. U. S. 271 Fed. 651;

Reeves v. U. S. 263 Fed. 690 at 691;

Kar Ru Chemical Co. v. U. S. 264 Fed. 921 at 929—9th C. C. A.;

Williams v. U. S. 265 Fed. 625;

Lane v. Leiter, 237 Fed. 149.

In the case of *United States v. Yaffe, supra*, the court said:

"*A litigant cannot be permitted to trifle with a court and thereby secure a new trial upon questions not fully and fairly presented by the objection and exception.* The objection in this case was a general objection to the admission of the bottle and contents in evidence. There was nothing in the objection to suggest to the court that the objection was based upon the label attached to the bottle. If

the Court's attention had been directed to this label, it would probably have ordered that it be removed before the bottle and contents were admitted in evidence, and, if it had failed to do so, the question would have been fairly presented to the trial court and a ruling obtained thereon, the correctness of which ruling could be determined by a reviewing court. Evidence had been offered tending to prove that this bottle and its contents were purchased from the defendant through his bartender Kellum; that the contents of this bottle was 45 per cent alcohol or 90 proof whiskey. The objection was directed solely to the admission of this bottle and contents, and not to the label on the bottle, and therefore was properly overruled."

If the Court will consult the various exhibits, it is conclusively shown that the defendant could not be prejudiced by the writing, and are undoubtedly guilty from the evidence of the documents alone, and if any error was committed it was not prejudiced.

See 1246 C. S.

Respectfully submitted,

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